

REPORT
on the Free Movement of Workers
in Italy in 2008-2009

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Introduction

The act transposing Directive 2004/38/EC into the Italian legal system has been modified again during 2008. The amendments relate mainly to the rules on expulsion, the provision stating that the Union citizen may report his presence to the Police after having entered the country is also important. In fact, even if reporting one's presence is not mandatory, not doing so entails that the Union citizen shall be regarded as having been in Italy for more than three months, unless he can prove otherwise.

The economic crisis and an attitude unfavourable towards foreigners, Union citizens included, have led the Government to enact new provisions on financial benefits but reserve them to Italian nationals or people residing in Italy since a long time.

The transitional period for Bulgarian and Romanian nationals has been renewed for 2008 and 2009.

Chapter I

Entry, Residence, Departure

Text in force

Legislative Decree 6-2-2007 no. 30, in force from 11-4-2007, transposing Directive 2004/38/EC into the Italian legal system. During 2008, Legislative Decree has been modified by [Legislative Decree 28-2-2008 no. 32](#). A further amendment was proposed, but not adopted, by the Government.

The most important points to highlight are:

- The task to ascertain that Union citizens satisfy the requirements for free movement have passed from the Police to the municipal authorities. Nevertheless, the municipal authorities have not been properly trained to manage the new task assigned to them, neither have they been adequately resourced. Some misunderstandings about the rights of the Union citizens have occurred (see below).
- A Union citizen that registers his residence with the municipal authorities becomes resident in Italy for the purposes of Italian law, for instance for tax purposes. In other words, registration counts as for the purpose of the Directive and for the purpose of the taking up of a principal place of residence in Italy.

A. ENTRY

Entry and residence up to three months

Legislative Decree 2008 no 32 added a new para. 5 bis to Article 5 of Legislative Decree 2007 no. 30. Before the amendment, Legislative Decree did not require the Union citizen to report his/her presence within the Italian territory. Following the 2008 amendment, the Union citizen may report his/her presence to a police office. The provision is not drafted as to impose an obligation, but if the Union citizen has not reported to the police office, s/he shall be regarded as having been stayed in Italy for more than three months, unless s/he can prove otherwise (see Article 5 para. 5-bis of Legislative Decree 2007 no. 30).

Legal scholars have much criticized that provision. In fact, while the Union citizen has no obligation to report, not doing so entails negative consequences for him. If he did not report, and was unable to prove that he had been in Italy no longer than three months (a proof very difficult to provide), he would be deemed to have infringed the obligation to register his residence with the municipal authority. In other words, the provision results in imposing additional documents not requested by the Directive, since the Union citizen can legally stay in Italy for less than three months if he can show, in addition to an identity card or passport, the document issued by the police stating that he reported his presence.

Residence for more than three months

The Union citizen that stays in Italy for more than three months has to register his residence with the municipal authorities of the place of domicile. The requirements upon which the registration is conditional have not changed during 2008. The application has proved difficult sometimes, because some Municipalities ask for more documents than allowed (a birth certificate, for example. The Ombudsman of Rome is dealing with the case.) The case of the French student whose application to the Municipality of Fiorio was refused for trivial reasons is exemplary of the problems that Union citizens can face. The case was redressed by the judge.¹

A number of Mayors, acting in their capacity as chiefs of the registry office, have issued some orders hardly in line with EU law. For instance, the Mayor of Oderzo ordered that each application for registration submitted by Union citizens should be passed to the Prefect and the Police in order to ascertain if reasons of public order or public security should prevent registration, and that the requirements upon which registration is conditional should systematically be reviewed at least every three years.²

Under the new Article 18 (2) of Legislative Decree 2007 no. 30, as amended by Legislative Decree 2008 no. 32, the registration into the population registry is cancelled in case of expulsion.

The Government submitted a proposal (not subsequently enacted) amending Legislative Decree 2007 no. 30 in order to make the Union citizen, which was not a worker or a student, prove that he drew his sufficient economic resources from a legal source. The same proposal based the obligation to register with Italian authority (that is the Municipality of the place of residence) on imperative grounds of public security. Therefore, if a Union citizen had not registered within three months and ten days of entry, he would have to be expelled for imperative grounds of public security – that is with the use of force – irrespective of the reasons why he did not comply with the obligation to register.

The Government submitted a proposal amending the legislation on the population registry to the Parliament. It stated that the registration into the register was conditional upon the Police check of the health and sanitary conditions of the building in which the applicant wants to live. This amendment aimed at preventing homeless people from making themselves scarce. But since Italy considers registration into the population registry and registration of residence for the purpose of free movement as equivalent, the proposal, if approved, will add a further requirement to those laid down in Article 9 of Legislative Decree 2007 no. 30, which corresponds to Article 8 of the Directive 2004/38/EC, that is a document issued by the Police stating that the building where the Union citizen lives meets health and sanitary requirements. The abovementioned proposal of the Government was not adopted. Nevertheless, under the new provisions that are waiting to be published in the Official Journal [Article 1.18 for details see Chapter IX], the municipal officers may proceed to a check of the health and sanitary conditions of the house of the applicant for registration into the population registry for the first time or for any successive variation (i.e. change of address). The provision, drafted in a non discriminatory way, is an open one that gives the municipal officers some powers, and it is not possible to understand from the mere wording how it will be imple-

1 Tribunale of Napoli, section of Ischia, judgment 23-7-2008.

2 Deliberazione della Giunta del Comune di Oderzo, 3-12-2007 no 223, in *immigrazione.it*, 15-1-2009, no 88/89.

mented in practical cases, and whether it will amount to placing an additional burden on Union citizens.

1. Transposition of provisions specific for workers: art. 7(1a); art. 7 (3 a-d); art. 8(3a); art.14 (4 a-b); art.17; art. 24 (2)

As far as the worker is concerned, Legislative Decree 2007 no. 30 does not state which documents the Union citizen is required to submit in order to prove his *status*. It only states that the Union citizen has to submit appropriate documentation to support his *status* (see Article 9). More details are provided for in the circular 2007 no 45. The *status* of worker is proved by a pay slip, or a receipt for payment of pension contributions, or a work contract bearing the INPS and INAIL code of the worker, or a communication of the hiring to the employment centre, or a receipt for the notification of the employment relationship to INPS; or a notification of the employment relationship to INAIL. The *status* of self-employed worker is proved by a certificate of registration in the register of the chamber of commerce, or a VAT number, or a certificate of registration with a professional association. The *status* of posted worker is proved by a declaration issued by the Italian branch of the parent company. The provision offers workers a wider range of documents to prove their status and shall be deemed in line with the spirit of EU law.

If the applicant is a Romanian or Bulgarian citizen, the ‘*nulla osta*’ required to work (when required: see Chapter VIII) shall be attached to the application for residence (see circular 6-4-2007 no. 19). This document is not necessary if the applicant was already legally resident in Italy before the entry into force of the Accession Treaty (see circular 8-8-2007 no. 45).

Article 7 (3) of Legislative Decree 2007 no. 30 reproduces Article 7 (3) of Directive 2004/38/EC and the four circumstances in which a worker or self-employed person retains his/her status even if s/he is not working. Two points are worthy of comment. Firstly, the act states that the worker in involuntary unemployment retains the status of worker if s/he is registered with a ‘*centro per l’impiego*’ (employment centre) or has offered his/her availability to work within a new job, pursuant to Article 2 (1) of Legislative Decree 2000 no. 181. Secondly, if the worker is in the condition of Article 7 (3) c (worker in involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months), s/he retains the status of worker for one year (the Directive reads ‘for no less than six months’).

Article 13 (3 a-b) of Legislative Decree 2007 no. 30 transposes Article 14 (4 a-b) of the Directive: workers and self-employed persons are therefore protected from expulsion except if based on reasons of public policy or public security.

Article 15 of Legislative Decree 2007 no. 30 corresponds almost *verbatim* to Article 17 of the Directive (Exemptions for persons no longer working in the host Member State and their family). The only point worthy of notice is that while the Directive states that Union citizens ‘who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week’ acquire the right of permanent residence by way of derogation even though they do not fulfil the general requirements laid down in Article 16 of the Directive, Legislative Decree states that, in order to benefit from this exemption, these Union citi-

zens have to retain their place of residence in Italy, while being employed in another Member State, and have to keep on satisfying the conditions for registration into the population registry.

Article 19 (3) of Legislative Decree 2007 no. 30 implements Article 24 (2) of the Directive. Under this provision, workers are entitled, even during the first three months, to those social benefits which are automatically connected to his/her job or are otherwise provided for by the law.

2. Situation of jobseekers

As far as the job-seeker is concerned, it is not clear whether he would be treated as a worker or as a non worker, and therefore required to have sufficient economic resources. Neither Legislative Decree 2007 no. 30, nor the implementing circulars devote specific provisions to the registration of the job-seeker's residence. Nevertheless, the protection of the job-seeker from expulsion is stated (Article 13 (3) corresponding to Article 14 (4) of the Directive) and applies both if the Union citizen can prove that he has been registered with an employment centre for less than six months, or if he has offered his availability to work within a new job. Under Article 19(3) of Legislative Decree 2007 no. 30, Union citizens who entered Italy in search for a job are not entitled to social assistance for the first six months of stay, unless these allowances are granted by the law.

Financial benefits equivalent to the ones which were in question in the *Collins* and *Ioannidis* cases do not exist in Italy.

B. DEPARTURE

1. Right of exit

Article 4 of Legislative Decree 2007 no. 30 states that the Union citizens with a identity document '*valido per l'espatrio*' (that is, enabling the holder to travel abroad) valid according to the law of the (issuing) Member State, and their non-EU family members with a valid passport, have the right to leave Italy to go to another Member State. The right to leave of Union citizens, or their non-EU family members who are minor or interdicted or disabled, is conditional upon the law of the State of origin.

The provision is drafted in broad and general terms and could encompass Italian nationals too. In any case, according to Article 16(1) of the Italian Constitution, 'All citizens are free to leave and re-enter the territory of the Republic, provided all legal obligations are fulfilled.' Among the legal obligations to fulfil there is the obligation of holding a document, an identity card or a passport. The identity card is issued by the Mayor of the place of residence and allows the holder to leave Italy and go to another country (see Article 3 of the Royal Decree 1931 no. 773). In 2008 it was decided that from 1-1-2010 the identity card will last ten years (instead of five) and will show the fingerprints of the holder (see Article 3 of Decree-Law 2008 no. 112).

The previous legislation on Union citizens (Decree of the President of the Republic 2002 no. 54, repealed by Legislative Decree 2007 no. 30) stated that Italy could not send back the holder of an identity document issued by Italian authorities, even if the document were no

longer valid or the Italian nationality of the holder were in dispute (see Article 11 (3)). No similar provision is now in force.

2. *Administrative expulsion*

The rules on administrative expulsions have been at the centre of many discussions during 2008. They have been amended twice: by Decree-Law 2007 no. 249, applicable from 2-1-2008 to 1-3-2008,³ and by Legislative Decree 2008 no. 32, amending Legislative Decree 2007 no. 30, which entered into force on 2-3-2008.

2.1. Italian law provides that the expulsion decision, issued in case the requirements upon which the right of residence is conditional cease shall be accompanied by a document to be signed by an Italian consulate abroad. If the person is found in Italy again and cannot exhibit the duly signed document, he is liable of a minor criminal offence, punished by a term of imprisonment from one to six months, and a fine from eur 200 to 2.000 (Article 21 (3) and (4) of Legislative Decree 2007 no. 30, as amended by Legislative Decree 2008 no. 32). Returning to Italy is not an offence, but not being able to show the document is, because the person is presumed not to have complied with the expulsion decision.

The denial of entry or residence, and expulsion decisions issued by the Prefect in case the Union citizens or their family members do not satisfy the requirements provided for by the law may be challenged to the ordinary court (Tribunal).

2.2. Decree-Law 2007 no. 249 allowed the Ministry of the Interior to expel Union citizens who were part of a terrorist organization or when there were reasonable grounds for believing that his/her stay in Italy could favor a national or international terrorist organization or its activities in any way (Article 3). Article 4 regulated the expulsion of Union citizens on imperative grounds of public security. Both orders were immediately enforceable by the *Questore* upon ratification by the magistrate (*giudice di pace*). In case of judicial review, the application was to be lodged to the administrative court (*Tribunale amministrativo regionale*) of Lazio, in case of expulsion for terrorism, and to the ordinary Tribunal, in case of expulsion on imperative grounds of public policy. The application for an interim order had no suspensive effect.

Legislative Decree 2008 no. 32 has added to Legislative Decree 2007 no. 30 those grounds for expulsion already envisaged by the two Decree-Laws (2007 no. 181 and 2007 no. 249) not turned into law. Therefore, Union citizens and their family members legally in Italy may be expelled on grounds of State security, imperative grounds of public security, and other grounds of public order or public security.

Union citizens who are entitled to the right of permanent residence may be expelled only on grounds of State security, imperative grounds of public security, and other serious grounds of public order or public security.

Union citizens who have been in Italy for the previous ten years or are minors may be expelled on grounds of State security or on imperative grounds of public security only.

Among the grounds of State security there is the case of the person being part of a terrorist organization or when there are reasonable grounds for believing that his/her stay in Italy

3 A Decree-Law is a law that the Government is allowed to enact in case of necessity and urgency, that ceased to produce its effects from the beginning if the Parliament does not turn it into an act within sixty days of the publication. The Parliament decided not to turn the Decree-Law into Law, because the new rules on expulsion were introduced in a draft Legislative Decree.

could favor a national or international terrorist organization or its activities in any way (Article 20 (2) of Legislative Decree 2007 n. 30 as amended, corresponding to Article 3 (1) of Decree-Law 2007 no. 249).

Imperative grounds of public security subsist when the behavior of the person to expel amount to a genuine, effective and serious threat affecting the fundamental human rights, or public safety, making his/her expulsion urgent because his/her stay is irreconcilable with orderly society. Previous criminal convictions decided by Italian or foreign judges, and preventive measures or expulsion orders decided by foreign authorities shall be given due account (Article 20 (3) of Legislative Decree 2007 n. 30 as amended.)⁴ Criminal convictions for a number of crimes are also taken into account. Among these, some are serious crimes (murder, rape) while others are offences that are not, as such, evidence of a social danger (e.g. counterfeiting).

The Ministry of the Interiors is entitled with the power of enacting expulsion decisions of Union citizens who have been in Italy for the previous ten years or are minors, as well as decisions based on public order or State security. The Prefect has competence for all other cases. Both Ministry and Prefects take due account of mayors' reports. Mayors are now entitled with the authority to pass any information regarding the illegal situation of Union citizens to the Police (see Article 6, para. 5-bis, of [Decree-Law 2008 no. 92, turned into Law 2008 no. 125](#)).

The decision is written in Italian and accompanied – if the person does not understand it – by a summary written in a language that the person understands or in any case in English, French, Spanish, or German.

The decision shall specify the time allowed for the person to leave the territory, which is not less than one month from the date of notification, but may be shortened to 10 days in case of proved urgency. The expulsion is immediately enforced by the *Questore* after being ratified by the Tribunal when the decision is grounded on State security or on imperative grounds of public security, or when the person remains in Italy after the time limit allowed to him/her. Pending ratification and execution, the Union citizen may be detained in a temporary holding center.

Each expulsion decision founded on grounds of public policy or public security is accompanied by a re-entry ban, for up to ten years if the expulsion is founded on grounds of State security, and up to five years in the other cases.

Persons excluded may submit an application to lift the exclusion order after a period corresponding to half the duration of the ban, and in any event after three years. The applicant shall put forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering his exclusion. The Prefect or Ministry of the Interiors which ordered the expulsion shall reach a decision on this application within six months of its submission. Pending the examination of the application, the applicant cannot enter Italy.

The breach of the re-entry ban is a criminal offence, punished by a term of imprisonment of up to two years, if the expulsion is founded on grounds of State security, and up to one year if the expulsion was decided on other grounds, and the offender is expelled again, with immediate effect. The judge may decide, instead of sentencing the culprit, to remove him and to ban him from the State for five to ten years. The *Questore* immediately enforces the

⁴ This provision corresponds to Article 4 (2) of Decree-Law 2007 no. 249 which by its part elaborated on Article 20 (7-ter) as amended by Decree-Law 2007 no. 81.

court's decision, even if it is not definitive. The infringement of the second ban is sentenced with a term of imprisonment of up to three years, and an expulsion decision immediately enforceable is enacted.

Remedies: expulsion orders founded on reasons of public security or on imperative grounds of public security may be challenged to the ordinary court (Tribunal).

Expulsion orders based on State security or on public policy may be challenged to the administrative tribunal of Lazio.

If the order is grounded on State security or on imperative grounds of public security, the application for judicial review does not have an automatic suspensive effect pending the judgment on an interim order to suspend the enforcement of the decision. The provision raises doubts because the exclusion of suspensive effects in case of decisions based on State security is not envisaged by Directive 2004/38/EC. In addition to that, the wording of the Directive is stricter than Italian ones: while only the challenge of decisions under Article 28.3 of the Directive (expulsion of Union citizens who have resided in the host Member State for the previous ten years or are minors, who can be expelled only on imperative grounds of public security) cannot have automatic suspensive effect, 'imperative grounds of public security' under Italian law is a reason for expulsion of general application. Therefore, a Union citizen who is not a minor nor has lived in Italy for ten years can be expelled for imperative grounds of security reason, and the challenge of that decision does not have automatic substantive effect, a result which is hardly in line with the Directive.

2.3. The Government wanted to go even further and to base the obligation to register one's residence with Italian authorities (that is the Municipality of the place of residence) on imperative grounds of public security. Thus, if a Union citizen had not registered within three months and ten days of entry, he would have been expelled for imperative grounds of public security – that is with the use of force – irrespective of the reasons for not complying with the obligation to register. After having received a negative opinion from the Commission, the Government decided not to adopt the proposal at issue, though it is still persuaded that expulsion in that case is perfectly in line with Community law.⁵

2.4. Another issue worthy of mention is the census of people living in legal and illegal camps (on the census see Chapter III) that the Government decided to carry on. The [Guidelines issued by the Ministry of the Interiors](#) and addressed to the Prefects in charge of the census, mentioned the possibility of expelling EU nationals. If the Prefect detected in a camp a Union citizen in relation to whom imperative grounds of public security or other circumstances provided for by the law justified an expulsion, he should take appropriate measures. It is nevertheless not clear how the Prefect can ascertain, while he is visiting a camp, whether imperative grounds of public security do subsist. The provision can mean that if the Prefect discovers that a Union citizen has been convicted for a crime, he could start an administrative proceeding in order to ascertain whether the person were to be expelled or not. If the proposed interpretation is correct, it could amount to a discrimination to the benefit of other foreigners, since the Guidelines make no mention of what the Prefect should do in the case a foreigner should turn out to be an offender.

5 The Ministry of the Interior, Roberto Maroni, announced the abandonment of the proposal at a hearing of the Schengen Committee of the Parliament on 15-10-2008, and added that in his opinion the proposal was absolutely legal and in line with EC law ('norma che secondo me è invece assolutamente legittima e conforme alle direttive europee': report of the hearing, p. 39).

3. *Judicial expulsion*

The Italian legal system regulates the expulsion of foreigners found guilty of particular offences (crimes against the State: Article 312 of the Criminal Code; serious crimes related to drugs: Article 86 of Decree of the President of the Republic no. 309 of 1990) or sentenced to a term of imprisonment of a certain length (Article 235 of the Criminal Code). In those cases, expulsion is a security measure, which is a measure enacted against a person who represents a danger for the general public, in order to prevent him from committing further crimes. Therefore, expulsion is not automatic, but depends on a specific analysis of the danger that the offender represents, made by both the judge who convicts him and the supervising court after the person has served his term of imprisonment. In order to ascertain if the person represents a danger, the judges have to take into account the offence committed, the circumstances in which the offence took place, and the personality of the offender. In doing that, the judge was not expressly committed to take into account the general principles laid down by Articles 27 and 28.1 of Directive 2004/38/EC. After an amendment that is waiting to be published in the *Official Journal* [Article 1.4, for details see Chapter IX], the new Article 183-ter of Legislative Decree 1989 no. 271 will state that expulsion of Union citizens is to be carried out according to Article 20 of Legislative Decree 2007 no. 30 (implementing Articles 27 and 28.1 of the Directive). Thanks to the amendments, it is now clearer than before that the execution of any expulsion as security measure is to be carried out according to Article 20 of Legislative Decree 2007 no. 30, and that the judge has to take into account all the factors that EU law requires before deciding on the expulsion of a Union citizen under Articles 235 and 312 of the Criminal Code.

The Criminal Code has been modified in order to clarify that Union citizens can be expelled when convicted (but nothing has changed, since there were few doubts that Union citizens were within the scope of application of the provision) and to lower the term of imprisonment, which is the condition for expulsion, from ten to two years (see [Decree-Law 2008 n. 92, turned into Law 2008 n. 125](#), modifying Article 235 of the Criminal Code).

Marini (Il decreto legge n. 92 del 2008 e le modifiche al codice penale relative all'espulsione come misura di sicurezza: questioni aperte sul trattamento dei comunitari, *immigrazione.it* no. 83 of 1-11-2008) thinks that the amended provisions, while applicable to all foreigners, are intended to address the case of Union citizens, and particularly those that only recently ceased to be foreigners. In fact, a foreigner sentenced to a term of imprisonment of two years can be expelled on the basis of Article 15 of the general legislation on immigration (which is worded differently, but has more or less the same scope of application of the new Article 312 of the Criminal Code). Therefore, if the Criminal Code had not been amended, a new Union citizen would not have been expelled if sentenced to a two-year term. Nomads who live in Italy are Italian citizens, Union citizens, third country nationals, and stateless persons. Italian citizens obviously cannot be expelled; on the contrary, nomads coming from EU countries can be expelled in those cases provided for by EU law and according to EU rules. EU law requires that due account shall be given to the ties of the person in the host State and his links with the country of origin. Since many EU nomads who were born in Italy have few, if any, ties with their country of origin, the Author believes that they would be protected by EU law and should not be expelled, even though expelling those people was precisely the aim of the provision.

4. *Assisted returns*

A new provision is going to enter into force [Article 1.29; see Chapter IX for more details] extending the measures of assisted return, as provided in consolidated law on immigration (Legislative Decree no. 286 of 1998) for third-country nationals unaccompanied minors, to unaccompanied EU minors who are involved in prostitution activity. That means that the State will bear the costs, where it is in their best interest to be returned to their country of origin.

Recent literature

In general on Italian legislation on Union citizens

- P. Amato, Il diritto alla libera circolazione alla luce dell'entrata in vigore della direttiva n. 2004/38/CE: il quadro europeo e il caso italiano, *Diritto delle relazioni industriali*, 2008, p. 571-581.
- L. Cordì, La disciplina penale connessa all'espulsione amministrativa o giudiziale del cittadino extracomunitario o apolide ed il sistema di allontanamento del cittadino comunitario, in: L. Degl'Innocenti (a cura di), *Stranieri irregolari e diritto penale*, Milano: Giuffrè 2008, p. 227-274.
- M. Gozzi, Circolazione e soggiorno nell'Unione europea (D.Lgs. 6 febbraio 2007, n. 30 e successive modificazioni): la tutela giurisdizionale, *Rivista di diritto processuale*, 2008, p. 175-190 (on legal remedies against expulsion decisions.)
- R. Miele, Trattamento dei cittadini comunitari ed extracomunitari: i principali interventi del legislatore e della giurisprudenza nel 2007, *immigrazione.it*, no. 72 of 15-5-2008 (a brief summary of the most important laws and judgments on the treatment of EU and non-EU foreigners. A few pages are devoted to Legislative Decree 2007 no. 30 and to its amendments).
- R. Minardi, Iscrizione anagrafica dei comunitari non lavoratori: risorse personali e derivanti da fonti lecite, *Lo stato civile italiano*, 2008, p. 427-432 (the Author believes that Italy is not in line with EU law in that it lays down that a Union citizen who is not a worker enjoys the right of residence only if he has legal resources and gives no guide to the keeper of the registry for the evaluation of the appropriateness of the comprehensive sickness insurance cover.)
- R. Panozzo, Il diritto di soggiorno dei cittadini dell'Unione e dei loro familiari tra direttiva comunitaria, norme di attuazione, chiarimenti ministeriali e perplessità della dottrina, *Lo stato civile italiano*, 2008, p. 182-190, 267-275, 344-352, 433-444.
- O. Vercelli, I minori 'accompagnati' e 'non accompagnati' (comunitari ed extracomunitari) nella normativa attualmente vigente in materia di immigrazione, *Lo stato civile italiano*, 2008, p. 516-518 (the Author points out that the treatment of EU non accompanied minors is not regulated by the law and that it is not sure that the rules on immigration that protect the non accompanied minor from expulsion could apply to the Union citizens too.)
- O. Vercelli, La cancellazione dell'A.P.R. degli stranieri (comunitari ed extracomunitari): un riesame complessivo della normativa attualmente vigente anche con riferimento ad alcuni casi particolari (allontanamenti ed espulsioni), *Lo stato civile italiano*, 2008, p. 423-426 (the Author recalls that Article 11 of Decree of the President of the Republic 1999 no. 394 provides that a foreigner is cancelled from the population registry whether he has not renew the so called '*dichiarazione di dimora abituale*' within one year of the expir-

ing of this residence permit. He believes that this rule applies to the non-EU spouse of a Union citizen or to the Union citizen who has been granted with a residence permit according to the general legislation on immigration in case he did not satisfy with the requirements laid down in Article 9 of Legislative Decree 2007 no. 30.)

On Legislative Decree 2008 no. 32

- A. Caputo, La nuova disciplina del diritto di circolazione e soggiorno del cittadino comunitario, *Diritto penale e processo*, 2008, p. 784-794.
- L. Cordi, L. Degl'Innocenti, Il nuovo assetto legale in tema di allontanamento dei cittadini comunitari: le modifiche del D.LG. n. 32 del 2008 al D.LG. n. 30 del 2007, *Giurisprudenza di merito*, 2008, p. 1538-1547.
- M. Di Filippo, La libera circolazione dei cittadini comunitari e l'ordinamento italiano: (poche) luci e (molte) ombre nell'attuazione dell direttiva 2004/38/CE, *Rivista di diritto internazionale*, 2008, p. 420-448.
- A. Lang, Le modifiche al decreto legislativo n. 30 del 2007 sui cittadini comunitari, *Diritto immigrazione e cittadinanza*, 2008, 3/4, p. 120-139.
- O. Vercelli, L'allontanamento dal territorio nazionale del cittadino UE: le modifiche introdotte dal D.Lgs. n. 32/2008 al D.Lgs. n. 30/07, *Lo stato civile italiano*, 2008, p. 747-749.

On the amendments drafted by the Government but subsequently withdrawn:

- M. Di Filippo, Pacchetto sicurezza e cittadini comunitari: verso un contenzioso con l'Unione europea, *nelMerito.com*, 2008.
- M. Parducci, I correttivi al decreto legislativo n. 30 del 2007 in materia di comunitari: le nuove disposizioni sul diritto di soggiorno, *immigrazione.it*, 1-11-2008, no 83.

Chapter II Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

Article 6 (3) of Legislative Decree 2007 no. 30⁶ states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens and their family members staying in Italy for up to three months, are subject to the same obligations as Italian nationals in the exercise of allowed activities.

Article 19 (1) of Legislative Decree 2007 no. 30⁷ states that Union citizens and their family members who enjoy the right of residence or the right of permanent residence are entitled to take up employment or self-employment in Italy, with the exclusion of those activities that the law, in conformity with EC law, reserves to Italian nationals.

Article 10 of Legislative Decree no. 276 of 2003 prohibits bodies in charge of serving as intermediaries between supply and demand on the employment market (for instance providing temporary staff for third parties) from pre-selecting employees on the grounds of (among others) national origin.

2. LANGUAGE REQUIREMENT

Article 3.1 of Italian Constitution states that ‘All citizens have equal social dignity and are equal before the law, without distinction of sex, race, *language*, religion, political opinion, personal and social conditions’.

The official language is Italian, but a special status is reserved to French in Valle d’Aosta, German in Trentino-Alto Adige, and Slovenian in Friuli-Venezia Giulia, because linguistic minorities live in these Regions.

A number of labour offers are reported to ask for applicant of ‘Italian mother tongue’. The problem has been disclosed by the newsletter of ASGI (Associazione studi giuridici sull’immigrazione – www.asgi.it). No case law could be found.

6 Legislative Decree has transposed Directive 2004/38/EC into the Italian legal system.

7 Legislative Decree has transposed Directive 2004/38/EC into the Italian legal system.

Chapter III

Equality of treatment on the Basis of Nationality

Non-discrimination is a well-established principle of Italian legal order, enshrined in the Constitution (see Article 3). As a rule, Italian laws define the persons they apply to by reference to general categories, such as workers, taxpayers, etc. In addition to that, the legislation provides for a number of provisions prohibiting non-discrimination in general that can be invoked by the Union citizen.

A provision of general scope is Article 19 para. 2 of Legislative Decree 2007 no. 30 (transposing Directive 2004/38/EC), which states in general terms that the Union citizen who stays in Italy in accordance with that law is entitled to the same treatment as Italian nationals within the scope of the EC Treaty.

Nevertheless, some important changes have taken place that can affect Union citizens in a way that it is difficult to fully appreciate from the outset. The most significant novelty stems from an amendment to the consolidated law on immigration. In general terms, only non-EU foreigners were within the scope of this legislation, but it applied to Union citizens too whether the regulations laid down by it were more favourable to them compared to others. The legislation on immigration was the threshold below which the treatment of Union citizens could not go, and it benefited especially those who did not enjoy the right to stay under the law transposing Directive 2004/38. After the amendment, the consolidated law on immigration is no more applicable to Union citizens.⁸ As explained in the following pages, the amendment is aimed at denying non working Union citizens of free health care, but it could have wider consequences.

1. WORKING CONDITIONS

The labour legislation protects workers from discriminatory behaviours of the employer (see articles 15 and 16 of Law 1970 no. 300 the so called *Statuto dei lavoratori*).

2. SOCIAL AND TAX ADVANTAGES

Social advantages

Article 38 (1) and (2) of the Constitution read as follows:

‘Every citizen unable to work and without the resources necessary to live has a right to social maintenance and assistance. Workers have the right to be provided with and assured adequate means for their needs and necessities in the case of accidents, illness, disability and old age, and involuntary unemployment.’

⁸ After the amendment brought by Article 37 para. 2 of Decree-Law 2008 no. 112, Article 1 para. 2 of Legislative Decree 1998 no. 286 reads as follows: ‘Il presente testo unico non si applica ai cittadini dell’Unione europea, salvo quanto previsto dalle norme di attuazione dell’ordinamento comunitario.’

While the first paragraph only deals with Italian nationals, the second addresses all workers, irrespective of their nationality.

Article 19 (2) of Legislative Decree 2007 no. 30⁹ states that Union citizens residing in Italy on the basis of the act enjoy equal treatment with Italian nationals within the scope of application of the EC Treaty. The derogation from the equal treatment provision, laid down by Article 24 (2) of Directive 2004/38/EC, is implemented in more liberal terms by Legislative Decree 2007 no. 30. While the Directive allows the Member States to deny both entitlement to social assistance during the first three months or during the longer period of stay for Union citizens in search of a job, and maintenance aid for students, the implementing provision restricts the application of this derogation. The derogation is limited to the granting of social security benefits. In any case, rights to social benefits associated with the activity pursued or otherwise granted by the law shall not be affected by the derogation (see Article 19 (3) of Legislative Decree 2007 no. 30).

Health care

The previous legislation on free movement (Decree of the President of the Republic 2002 no. 54) stated that a voluntary registration with the Italian health care office, granted upon payment of a charge, was a valid sickness insurance for the purpose of the right of residence. Therefore, an EU citizen was entitled to health care services either because he was a worker or a self-employed worker, or because was registered on a voluntary basis. The new legislation on free movement brought important changes to the subject. The voluntary registration is no more envisaged as a means to demonstrate not being a burden for the finances of the State. As a consequence, the health care local offices shall register only Union citizens and their family members already entered into the population registry and provided that they belong to the following groups: workers and self-employers and their family members; family members of Italian nationals; Union citizens entitled with the right of permanent residence; Union citizens in search of work or attending a vocational training course provided that they were already registered as workers before unemployment; Union citizens holding forms E106, E109, E120, E121. Union citizens not belonging to the abovementioned groups are not entitled to free health care (see [circular 3-8-2007 no. DG RUERI/II/12712/L.3.b](#) issued by the Ministry for Health, clarifying the effects of the implementation of Directive 2004/38/EC on registration with the national health care institutions).

Nevertheless, Union citizens are in all cases entitled to emergency treatment and to treatment that cannot be postponed, among which is that related to minors and maternity protection (including abortion). They can also benefit of vaccination campaigns and treatment for contagious diseases (see [circular 19-2-2008 no. DG/RUERI/II/3152.P/1.3.b/1](#) issued by the Ministry for Health). (But see A. Oriti, *Accesso all'assistenza sanitaria per i cittadini comunitari: criticità e proposte di intervento*, *Diritto immigrazione e cittadinanza*, 2008/1, p. 90-98. The author, a physician working for MSF, explains how difficult it is for EU citizens who are not workers to receive health treatment, even if essential, due to the ambiguity of the legislation in force.)

The present writer recalls that Article 35 of Legislative Decree 1998 no. 286 (the consolidated law on immigration) grants urgent and essential treatment in case of sickness or accident to foreigners who are in Italy, even if they do not fulfill the conditions for entry and

9 Legislative Decree has transposed Directive 2004/38/EC into the Italian legal system.

residence. This provision grants a wider range of treatments to non-EU foreigners and on more favorable conditions than those granted to EU citizens. Up to 2008, the rules on immigration could be applied to Union citizens if more favourable to them, as expressly provided for by Article 1 para. 2. This avenue is not available any more, due to an amendment to the Article in question. While the scope of the provision is general, its title reveals the real underlying intent: the title of Article 37 of Decree-Law 2008 no. 112 is ‘documents and health care’.

Social assistance

During the reporting period two different views inspired the activities of the Italian legislator: the intent to reduce the supposed impact of foreigners on Italian financial resources and the effort to help lower income households to face the effects of the economic crisis. This attitude is shown in the number of provisions enacted on social assistance benefits, some of which are available to everyone, while others are reserved to Italian nationals.

The ‘*assegno sociale*’ (social allowance)¹⁰ is a financial benefit awarded to old (over 65) and poor (no or very low income) persons resident in Italy (if the person moves his residence abroad, the benefit is not granted any more: it is a special non-contributory cash benefit under Article 10a of Regulation 1408/71). EU citizens whose residence is registered with the Municipal authority are entitled to the benefit. An additional requirement has to be satisfied from 1-1-2009 by all applicants, irrespective of nationality: ten years of legal and continuous residence in Italy in whichever period in the past. The requirement is drafted in a non discriminatory way, but it is self-evident that Italians can more easily satisfy it than EU citizens. The aim of the provision is to put an end to the supposed abuse of the benefit by foreigners to the detriment of Italians.

The ‘*social card*’¹¹ is a prepaid card of the value of eur 40 per months, which can be used in shops that accept it. Categories entitled to the ‘*social card*’ are: Italian citizens who are over 65, resident in Italy, with an annual income not exceeding eur 6.000; or to the parents of an Italian national who is under 3 years old, with a low annual income. On April 2009, the press reported that the Ministry of Labour was considering to grant this benefit to Union citizens too, but no subsequent proposal has been presented.

Those who are entitled to the ‘social card’ are also entitled to an additional benefit that is the ‘*bonus per latte e pannolini*’¹², intended to refund the expenses paid for infant milk and nappies for newborn babies up to the age of three months. Therefore, this benefit is reserved to Italian nationals.

The ‘*bonus famiglia*’ (family allowance)¹³ is a one-off payment to low (work-related or retirement-related) income households, and is awarded to persons resident in Italy irrespec-

10 The benefit was created for Italian nationals by Law 1995 no. 335. The subsequent Law 2000 no. 328 has equated EU citizens to Italian nationals as to the entitlement to social assistance allowances in general. The additional requirement of 10-year residence was introduced by Article 20 para. 10 of Law 2008 no. 133. See the circular letter by INPS 2-12-2008 no. 105 that explains the requirements upon which the benefit is conditional.

11 The benefit was created by Article 81 para 29 ff., of Decree-Law 2008 no. 112, turned with amendments into Law 2008 no. 133.

12 The benefit was created by Article 19 para. 18 of Law 2009 no. 2.

13 The benefit was created by Article 1 of Decree-Law 2008 no. 185, turned with amendments into Law 2009 no. 2. See also Revenue Authority, circular letter 2009 no. 2/E, which explains that family members residing abroad shall be taken into account.

tive of nationality. The maximum income per household depends on the number of persons who are dependant on the applicant. The family members who live abroad are taken into account.

According to Italian legislation, the Municipalities can enact social assistance allowances for people in need. The Municipality of Brescia by a decision of 21-11-2008 enacted a ‘*bonus bebè*’, a one-off payment (eur 1.000) for any newborn baby or adopted child in 2008, if at least one parent is an Italian national with a maximum annual income of eur 40.000. The Tribunal of Brescia by order of 26-1-2009 no. 335 upheld the application of a group of non-EU foreigners and ordered the Municipality to award the benefit to non Italians as well.¹⁴ The Municipality revoked its decision on the ‘*bonus bebè*’, stating that extending the benefit to non Italians would amount to an excessive burden on its finances, and would also be contrary to the aim of the provision, which was to increase birth rates within Italian households. This decision of the Commune was challenged by the same applicants, because it amounted to a reprisal. The Tribunal of Brescia, labor section, 12-3-2009, states that the decision of the Commune is discriminatory because adopted to avoid complying with the previous judgment of the Tribunal, which obliged the Commune to grant the benefit to certain categories of foreigners too. The judge orders the Commune to grant the benefit to the applicants (on the case, E. Giovanardi, Bonus bebè, disparità di trattamento e ‘singolare’ rimozione degli effetti discriminatori, *Corriere del merito*, 2009, p. 629-632).

Public housing

Some Regions and local authorities demand number of years of residence in the territory of the Region or of the Municipality as a requirement for access to housing built by the public sector or subsidized housing. The residence is either a condition for application, or gives additional points and is a preferential title. The following provisions can be mentioned as examples: having been resident or having worked in Lombardia for 5 years at the time of the application (Regional Law 2000 no. 1, Article 2, para. 41 bis lett. m); having been resident or having worked in the Province of Bolzano for 5 years at the time of the application (Provincial Law 1998 no. 13, Art. 97 para. 1, lett. a); having been resident or having worked in Valle d’Aosta for 5 years at the time of the application (Regional Law 1995 no. 39, Art. 6), having been resident or having worked in Italy for 10 years, of which at least 5 in the territory of Friuli-Venezia-Giulia at the time of the application (Regional Law 2003 no. 6, Art. 18 ante). The aim is to establish a link between the applicant and the benefit, but sometimes it is also to give priority to Italian nationals. UNAR (the body in charge of monitoring the application of Directive 2000/43/EC) declared these provisions as amounting to an indirect discrimination on the ground of national origin. On the contrary, the Constitutional Court dismissed a request of constitutional review submitted by the Administrative Tribunal of Lombardia about Regional Law 2000 no. 1, stating that the Region has the power to regulate the matter and the choices made are consistent with the aims pursued (order 2008 no. 32). Legal scholars have criticized the decision of the Court and pointed out that asking for residence can be contrary to the Constitution and to EC law (see C. Corsi, *Il diritto all’abitazione è ancora un diritto costituzionalmente garantito anche agli stranieri?*, *Diritto immigrazione e cittadinanza*, 2008, 3-4, p. 141-148; F. Corvaja, *Libera circolazione dei*

¹⁴ Judgment upheld by the Court of second instance: Tribunale di Brescia, 20-2-2009 no. 198/09.

cittadini e requisito di residenza regionale per l'accesso all'edilizia residenziale pubblica, *Le Regioni*, 2008, p. 611-634).

Article 11 of [Decree-Law 2008 no. 112, turned with modification into Law 2008 n. 133](#), states that the Government shall establish a fund for housing, to finance building of houses to be sold as main residence to the following beneficiaries: a) low income households, b) low income young couples, c) elderly people in need, d) students who study away from home, e) evicted tenants, f) tenants who are legally protected against eviction; g) low income legal immigrants having been resident in Italy for at least ten years, or in the territory of the same Region for five years. Categories from a) to f) make no reference to nationality, while lett. g) specifically mentions immigrants. Two interpretations are possible: either, that (non-EU and EU) foreigners can benefit of the housing if they fall within one of the categories a) to g); or that only lett. g) addresses the case of foreigners while the others are reserved to Italian nationals. In addition to that, in the Italian legal system there is no general definition of 'immigrants', but the meaning depends on the applicable provision. Therefore, 'immigrants' can be employed as opposed to 'nationals' and comprise EU and non-EU nationals, or be limited to non-EU foreigners. In either case, how Union citizens are qualified for the purpose of the benefit under examination is not clear.

Tax advantages

Whoever, for most of a given fiscal year (183 or 184 days) is registered into the Italian population registry, or, while not registered into the population registry, has in Italy his centre of personal and professional interests, is resident in Italy for tax purposes. An Italian national who moves his residence abroad during the second half of a given fiscal year is deemed to be taxable in Italy also for the income produces abroad (see Revenue Authority, resolution 3-12-2008 no. 471/E).

An Italian citizen who moves his residence abroad shall be entered into the AIRE (*Anagrafe degli italiani residenti all'estero* – registry of Italian nationals residing abroad) upon request. After six months from the registration, the Municipality shall communicate to the Revenue Authority that the relevant person does not reside in Italy any more. During the following three years, the Municipal and Revenue Authorities shall make sure that the applicant has actually moved his residence and has lost any links with Italy (see Article 83 para. 16 of [Decree-Law 2008 no. 112, turned into Law 2008 no. 133](#)).

Legislative Decree 1992 no. 504 established the *Communal Tax on Immovable Property* (ICI). Under Article 8 co. 2, the taxpayer is allowed a deduction of eur 200 from the tax payable on the immovable property used as his principal residence. For the purpose of Article 8 co. 2, the relevant immovable property is also the one owned by the non-resident Italian taxpayer provided that it is situated in Italy and not let (under Article 1 co. 4-ter of Decree-Law 1993 no. 16, turned into Law 1993 no. 75).

An additional deduction amounting to 1,33% of the tax payable is established by Article 1, co. 5 of Law 2007 no. 244. The Ministry of the Economy decided that the deduction is available also to non-resident Italian taxpayers in relation to immovable property situated in Italy and not let (Resolution 2008 no. 5).

From 2008 the Communal Tax on Immovable Property is abolished on primary residential property, that is the one used as the principal residence by the taxpayer (Article 1 of Decree-Law 2008 no. 93, turned into Law 2008 no. 126). The Ministry of the Economy estab-

lished that the non-resident Italian taxpayer shall not be entitled to the abolition of the tax in relation to immovable property situated in Italy and not let (Resolution 2008 no. 15).

It has been pointed out (A. Piccolo, *Ici, pericolo di liti sugli immobili dei non residenti*, *Il Sole-24 ore*, 14-8-2008, p. 25) that the Ministry of the Economy showed a different approach toward the deduction of 1,33‰ and the abolition of ICI, allowing the benefit in the first case to non-resident Italian taxpayers and denying it in the second one, even if the two cases are very similar.

S. Dorigo (La notifica degli atti tributari all'estero nella prospettiva comunitaria dopo la sentenza n. 36/07 della Corte costituzionale, *Rivista di diritto internazionale*, 2008, p. 459-466) claims that Italian rules on the notification of fiscal acts to non-resident persons infringes Article 12 TEC and amounts to an obstacle to the free movement of persons. In fact, Articles 58 and 60 of Decree of the President of the Republic 1973 no. 600 states that the non-resident taxpayer is deemed to have his domicile in Italy. Notification of fiscal acts is carried out by sending them to the taxpayer's known address in Italy or by displaying a notice for eight days on the notice board of the Commune of his domicile. After receiving a letter of formal notice from the European Commission, Italy has modified these rules by Law 2006 no. 248 and the Commission closed the infringement proceeding (IP/07/19). The new rules state that, by way of derogation from the abovementioned provisions (which are still in force), fiscal acts shall be notified at the overseas address of the non-resident taxpayer. In case the taxpayer has not communicated his address to the Italian authorities, the fiscal acts are notified in Italy. The Constitutional Court said that these provisions are in contrast with the Constitution, unless interpreted in the sense that the fiscal acts are to be notified to the address that the non-resident Italian taxpayer has communicated to the AIRE (*Anagrafe degli italiani residenti all'estero* – registry of Italian nationals residing abroad) and not only to the Revenue Authority. The Author criticizes the European Commission for being satisfied with the modified rules, which are still in contrast with EC law.)

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

Census of camps

During the month of August 2008 the Government decided to take a census of people living in legal and illegal camps sited in Campania, Lazio, and Lombardia. In 2009 the scope of the decision has been extended to camps sited in Piemonte and Veneto. The aim was twofold: firstly, to identify the people living there, even by taking their fingerprints; and secondly, to evaluate the social and sanitary conditions of the camps, in order to allow the public authorities to plan the provision of healthcare and educational services for the benefit of the inhabitants.

The first announcements of the Government gave rise to fears that the census would turn into a screening on the basis of ethnic origin. But implementation, thanks to the observations submitted to the Government by the Italian Data Protection Authority and by the European Institutions, turned out to be less worrying than feared. In fact, fingerprints were taken only if identification by other means was not possible, in which case, the person concerned was then provided with a copy of an identity document, with his picture and fingerprints on it.

The Criminal Code provides for a new *aggravating circumstance*: the case that the offence has been committed by a person who is residing illegally in Italy (Article 61, no. 11

bis, of the Criminal Code, as amended by [Decree-Law 2008 n. 92, turned into Law 2008 n. 125](#)). The notion of ‘illegal residence in Italy’ is not defined and is surrounded by a certain amount of uncertainty¹⁵, neither is it clear whether a Union citizen can ‘illegally reside’. A likely interpretation is that a person illegally resides in Italy if he does not satisfy the requirements upon which residence is conditional. Therefore a Union citizen illegally resides in Italy only when he has not complied with an expulsion decision or has entered Italy in breach of a re-entry ban, or does not meet any of the requirements laid down by EC law. To cope with the criticisms of the European Commission,¹⁶ a new provision waiting to be published in the *Official Journal* [Article 1.1; for details see Chapter IX], states that the aggravating circumstance of Article 61 para. 11 bis does not address the case of Union citizens.

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1 Frontier workers

A number of financial benefits are awarded only to people residing in Italy (see under para. 2 above). As far as the *Hartmann* case is concerned, Italian law provides for maternity benefits, set in Articles 74 and 75 of Legislative Decree no. 151 of 2001 (*Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità*). These benefits are granted for every child born or adopted.

Under Art. 74 (*Assegno di maternità di base*) women resident in Italy, who are not entitled to other kind of maternity benefits as workers or self-employed workers (such those set in Articles 22, 66 and 70), are granted a maternity benefit as a one-off payment of about 1.500 euro for every child born or adopted, irrespective of their nationality (Italian or EU nationality or non-EU nationality: in the latter case, they have to hold a residence permit). They shall not have an income higher than about 31.000 euro per year.

Under Art. 75 (*Assegno di maternità per lavori atipici e discontinui*) women resident in Italy, who are not entitled to other kind of maternity benefits as workers or self-employed workers (such those set in Articles 22, 66 and 70), but who paid welfare contributions for at least three months, are granted a maternity benefit as a one-off payment of about 1.800 euro for every child born or adopted, irrespective of their nationality (Italian or EU nationality or non-EU nationality: in the latter case, they have to hold a residence permit). No minimum amount of income is required.

4.2 Sportsmen/sportswomen

Football

No modifications to refer.

15 Much discussed is even whether an aggravating circumstance drafted in such a way is in line with Italian Constitution. Legal scholars are divided and a case is pending before the Constitutional Court on a request by the Tribunal of Latina (order of 1-7-2008).

16 See, for instance, the answer given by Mr Barrot to the Parliamentary question no. E-5326/2008.

Basketball

Some modifications to the FIB (Federazione italiana Basket – Italian Basketball Federation) Regulation were introduced in 2008 (it cannot be said when this exactly occurred). Article 31 now states that women's basketball clubs taking part in the A1 and A2 Championships can affiliate players who are EU citizens and have their stable residence in an EU Member State. Some other Articles were amended and reported by the Annual Rules of 2008/2009.

According to the Annual Rules of 2008/2009 on professional divisions, clubs taking part in the men's A Championship have to include in the referee's report a minimum of 6 players coming from an Italian training colt (among which clubs can exceptionally include two Italian nationals not coming from the Italian training colt) and a maximum of 4 non-EU players. Clubs taking part in the *Legadue* Championship have to include in the referee's report a minimum of 7 players coming from the national training colt and a maximum of 2 non-EU players. Players who have played in the youth Championships organized by the Federation for at least 4 successive seasons, irrespective of their nationality, are considered as coming from the national training colt ('*giocatori di formazione italiana*').

According to the Annual Rules of 2008/2009 on non-professional divisions, clubs taking part to the women's A1 Championship can include in the referee's report no less than six players coming from the national training colt and no more than two players who hold the nationality of a country not included by the FIBA in the list of Art. 2 of the 'Bye-Laws of FIBA EUROPE'. Art. 2 of the 'Bye-Laws of FIBA EUROPE' states that: '*FIBA Europe consists of those national member federations of FIBA assigned to it by FIBA. The national federations which are members of FIBA Europe are listed in Annex 1, as attached to these Bye-Laws.*' Annex 1 provides for the list of the 51 national federations which are Members of the FIBA Europe. These are the national basketball federations of the following countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, England, Estonia, Finland, France, FYROM (Former Yugoslav Republic of Macedonia), Georgia, Federal Republic of Germany, Gibraltar, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Principality of Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Republic of San Marino, Scotland, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, Wales. In other terms, the women's A1 Championship clubs cannot include in the referee's report more than two foreign players holding the nationality of a country not included in the list. Furthermore, the women's A1 Championship clubs shall field no less than two players coming from the national training colts in each match. Clubs taking part to the women's A2 Championship can field only one EU player or one Italian player who is foreign-born or coming from a foreign Federation or one foreign player who acquired Italian nationality.

Under the new rule contained in Art. 31 (see above) players having EU nationality can be affiliated by the women's A1 and A2 Championship clubs without numerical limitations, provided that they are permanently resident in an EU Member State. The additional requirement of the stable residence in an EU Member State (besides EU nationality) does not seem to be in line with Community Law.

The rules providing for the other limitations (those regarding the referee's report and the playing field) are based on the notion of '*giocatori di formazione italiana.*' This notion is not based on nationality considerations. To the contrary, the qualification of '*giocatore di formazione italiana*' is acquired by a player after having played for at least four successive sea-

sons in the Italian Youth Championships, irrespective of her/his nationality. Nevertheless, the rule requiring a club taking part in the men's A Championship to include a minimum of six players coming from an Italian training colt is enforced in a discriminatory way. This is because among this six '*giocatori di formazione italiana*' clubs can exceptionally include two Italian nationals not coming from the Italian training colt. Furthermore, under the same rule these clubs can include in the referee's report a maximum of four non-EU players. This limitation is clearly nationality-based. Therefore, this limitation, being directly discriminatory, could be regarded as contrary to Community Law as far as it concerns citizens belonging to countries which have concluded Association Agreements with the EC. The same conclusion can be reached as to the rule which provides that Clubs taking part in the *Legadue* Championship can include in the referee's report a maximum of two non-EU players.

The rule according to which clubs taking part in the women's A2 Championship can field only one EU player or one Italian player who is foreign-born or coming from a foreign Federation or one foreign player who acquired Italian nationality is clearly in breach of Community Law.

Water polo

According to Article 9.5 of the General Regulation of the Italian Water polo Federation for the 2008/2009 season, the sporting club taking part in the Italian championships that is going to affiliate a 'non-Italian athlete' shall pay a 600 € fee to the Italian Swimming Federation, require a visa, a residence permit and a transfer certificate to the Ligue Européenne de Natation (LEN) in case of athletes coming from an association affiliated to the LEN. According to Article 9.6 a sporting club can replace an affiliated 'non-Italian athlete' during the championship but a fee amounting to 600 € is due for the replacement. Furthermore, a 'non-Italian athlete' who has been replaced can be affiliated by sporting clubs taking part in men's A2 Championship. According to Article 9.7, the 2008/2009 quota of non-EU athletes assigned by the CONI to the Italian Swimming Federation (*Federazione Italiana Nuoto*) amounts to 70 units. Annual quotas are fixed by the CONI taking into account the purpose of protecting the national training colts and the national sport environment. Affiliation of foreign athletes is possible only if it is expressly set out in specific regulations on each championship. For the 2008/2009 season Italian water polo clubs taking part in the National men's and women's A1 Championships can affiliate no more than one foreign athlete. Italian water-polo clubs taking part in the National men's A2 Championship can affiliate no more than one foreign athlete. Sporting clubs taking part in the men's B Championship, women's B Championship, men's C Championship, men's *Promozione* Championship can affiliate only one 'non-Italian athlete' upon the following conditions: a) the athlete has already been affiliated for the last three seasons by that sporting club; b) the athlete has participated for at least one out of three seasons to a youth championship with that club. Moreover, the athlete can participate to the above-mentioned Championships only by joining sporting clubs which have the right to affiliate her/him in accordance with these conditions. Italian clubs taking part in National Youth men's or women's Championships can affiliate only one young foreign player upon condition that her/his parents have been residing in Italy since at least 6 months and have guaranteed their daughters' or sons' participation to the sporting activities for all the season. This affiliation has to be licensed by a Federal Council's resolution. 'Non-Italian players' cannot join water polo clubs taking part in the National women's A2 Championship.

Ice-Hockey

According to the Annual Federal Rules on Italian Ice-Hockey men's A Championship of the 2008-2008 season, it is necessary to distinguish between Italian players trained in Italy or having Italian nationality (A category) and players having foreign nationality and/or trained abroad (B category). The A category includes: a) Italian national players who have never been affiliated to a foreign Federation and are affiliated to the FISG for the first time; b) Italian national players coming from a foreign Federation if they have already played in Italy for two successive seasons or are eligible to join the Italian National team; 3) foreign national players even if coming from a foreign Federation provided that they have played in the FISG National Youth Championships for at least three consecutive seasons; 4) players coming from a foreign Federation and having Italian nationality who have played within the 'foreign players' quota' in Italian championships for at least two whole seasons; 5) foreign national players who have never been affiliated to a foreign Federation and are affiliated to the FISG for the first time. The B category includes: 1) players already affiliated to a foreign Federation and having EU nationality or an equivalent nationality (*i.e.* a nationality of a country having concluded a treaty providing for free movement of people and, in any case, whose entrance in Italy does not require a visa); 2) non-EU players who have been already affiliated to a foreign Federation; 3) players coming from a foreign Federation and having Italian nationality provide that they have not played in Italy for at least two whole seasons or are not eligible to join the Italian National team. Every club taking part in the men's A Championship has to fill out the referee's report so as to include no less than 14 players and 1 goalkeeper of A category and no more than 7 players of B category (among these 7 players there shall be no more than 5 non-EU nationals). Furthermore, clubs taking part in the men's A Championship cannot affiliate more than 5 players who are non-EU nationals but are free to affiliate players having EU nationality or an equivalent nationality and players coming from a foreign Federation but having Italian nationality even if they have not played in Italy for at least two whole seasons or are not eligible to join the Italian National team without limitations. Ice-Hockey associations are not free to affiliate non-EU players without limitations. A club taking part in the Under 19 Championship can affiliate and field no more than two non-EU players Under 18. Clubs taking part in the Under 17, 15, 13, 11, 10 and 8 Championships can affiliate non-EU players without restrictions, but they can only field them according to the following limitations: clubs taking part in the Under 11, 10 and 8 Championships can field non-EU players without restrictions; clubs taking part in the Under 17, 15 and 13 Championships can field no more than two, three and four non-EU players, respectively. In any case, athletes of non-EU nationality who have played in the FISG National Youth Championships for at least three consecutive seasons are considered as Italian players trained in Italy or having Italian nationality (A category). As a consequence, clubs are free to affiliate them without restrictions. According to the Federal Annual Rules for the 2008/2009 season, clubs taking part in the Italian A2 Championship which have affiliated 2 goalkeepers belonging to A category can field 3 players belonging to B category (among these only 2 non-EU nationals) and 17 other players belonging to A category for each match. Clubs which have affiliated one goalkeepers belonging to B category can field one player coming from a foreign Federation and one goalkeeper and 17 players belonging to A category. Clubs can affiliate no more than 4 players coming from a foreign Federation (among these only 2 non-EU nationals) provided that they have 2 goalkeepers belonging to A category. They can affiliate no more than 3 players coming from a foreign Federation if they have

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only 1 goalkeeper belonging to A category. All clubs can affiliate and field a player (but not a goalkeeper) coming from a foreign Federation having an 'Italian passport Under 24' (born after 1.1.1985) without restrictions.

Volleyball

No modifications to refer.

Handball

According to the 'Vademecum 2008-2009', citizens of the following countries are considered as EU players: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Ireland, Iceland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, The Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia, Spain, Sweden, Hungary. Every other foreign national is considered a non-EU player. EU players can be affiliated by Italian clubs without restrictions. Clubs taking part in the men's A 'Elite' Championship can affiliate no more than 6 non-EU players. Clubs taking part in the women's A1 Championship can affiliate no more than 4 non-EU players. Clubs taking part in the men's A1 Championship can affiliate no more than 2 non-EU players. Clubs taking part in the other Championships cannot affiliate non-EU players within the quota established by the CONI or field them. Clubs can affiliate non-EU nationals who are resident in Italy and have never been affiliated to a foreign Federation without limitations. To affiliate a foreign player, the international transfer authorization released by the European Handball Federation (EHF) or the International Handball Federation is necessary. Clubs taking part in the men's A 'Elite' Championship can field no more than 4 foreign players (irrespective of their nationality) for each match. Clubs taking part in the women's A1 Championship can field no more than 3 foreign players for each match. Clubs taking part in the men's A1 Championship can field no more than 1 foreign player for each match. Club taking part in the men's and women's A2 Championships can field only 1 EU player or 1 non-EU national who are resident in Italy and have never been affiliated to a foreign Federation for each match. Clubs taking part in the men's B Championship can field only 1 EU player or 1 non-EU national who is resident in Italy and has never been affiliated to a foreign Federation for each match. Clubs taking part in the women's B Championship can field EU players and foreign players who are resident in Italy and have never been affiliated to a foreign Federation in so far as they represent 30% of total team players for each match. Clubs taking part in the National men's Under 18 Championship can field no more than two players among EU players and foreign players who are resident in Italy and have never been affiliated to a foreign Federation upon the condition that clubs field no less than 12 Italian players for each match. Clubs taking part in the Italian Championships (other than those taking part in the men's A 'Elite' Championship) which have affiliated a foreign coach shall affiliate an assistant coach having Italian nationality.

Rugby

According to the Regulation of the Italian Rugby Federation, the Federal Council establishes numerical restrictions to affiliation of non-EU players for each Championship belonging to *Seniores* category in accordance with the existing legislation and CONI's Directives (Art.

41.2). Foreign players belonging to *Juniors* and *Propaganda* categories can be affiliated by Italian clubs only through a Federal Council's resolution which will fix annual restrictions, in accordance with the existing legislation and CONI's directives. These players can participate only to the *Category* Championships (Art. 41.3). Limitations as to the use of foreign players are fixed for each season, in accordance with the directives enacted by CONI in order to protect the national training colts (Art. 42.1). Clubs taking part in the National Championships have to include in the referee's report a minimum of players coming from the national training colt. This minimum cannot be less than 50% of total team players included in the referee's report (Art. 42.3).

4.3 The Maritime sector

Italy has been convicted by the Court of Justice for maintaining in its legislation the requirement that masters and chief officers on all vessels flying the Italian flag hold Italian nationality (see case C-447/08 [2008]). No provisions have been enacted to implement the Court's judgement by the time of this report.

No information or data are available about other discrimination of Union citizens or non-EU foreigners.

4.4 Researchers/artists

The employment relationship in the cultural sector is not specifically regulated under the Italian legal system and the employment's status of artists is not specifically defined. Therefore it is subject to the ordinary rules of the Italian Civil Code. An artist who works in Italy is qualified as self-employed or as an employee depending on the individual situation. It does not seem that the legal status of an artist varies depending on her/his (Italian or of another Member State) nationality and no case-law points to the contrary.

4.5 Access to study grants

Grants and other benefits for students are awarded on a non discriminatory basis. Article 20 of Law 1991 no. 390 states in general terms that the benefits regulated by this law and by other Regional laws are given to foreign students in the same ways and under the same conditions as to Italian students.

D. Del Ben, *Circolazione degli studenti e sussidi all'istruzione: verso un allargamento dello spazio europeo dell'educazione*, *Diritto pubblico comparato ed europeo*, 2008, p. 476-479 (on joined cases C-11/06 and C-12/06 *Morgan* [2007] ECR I-9161.)

Chapter IV
Relationship between Regulation 1408/71 and Article 39 and
Regulation 1612/68

The national case law on Regulation no. 1408/71/EEC is very abundant. On the contrary, Regulation no. 1612/68/EEC is seldom invoked in front of national judges in cases that involve social security allowances. As far as we know, no discussion regarding the relationship between Regulation no. 1408/71/EEC and Regulation no. 1612/68/EEC has taken place.

Chapter V

Employment in the Public Sector

1. ACCESS TO THE PUBLIC SECTOR

Legal framework

Legislative Decree 2001 no. 165, on the General Rules on the status of employment in the public sector, regulates access to and employment in the public sector (to be understood in a broad meaning, including national, Regional or local authorities and every public body). Every Italian Region is free to organize its own Regional public sector through Regional laws, but within the limitations set by the Italian Constitution (such as Art. 97), which both State and Regions are subject to, and the general principles as contained in the State legislation (Legislative Decree no. 165 of 2001, Article 2.3).

Legislative Decree no. 165 of 2001 states three core-principles as to the legal regime of the employment in the public sector. Firstly, it transformed the status of the personnel in the Italian public sector from civil servants subjected to a public law regime, into employees subjected to the ordinary rules of the Italian Civil Code, on the same footing with the employees in the private sector (Article 2.2). However, according to Article 3 of Legislative Decree no. 165 of 2001, some specific categories of workers in the public sector are still regarded as civil servants subject to a public law regime. Secondly, each employment relationship, except those still regarded as civil servants is established through a single contract, which has to adapt to the collective agreements between the A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*), that is the Agent of the Public Employer, and the trade unions related to the public sector (Article 2.3). Thirdly, the access to public employment is dependent upon the passing of an open competition (Article 35), which is a principle enshrined into the Constitution and upheld by the Constitutional Court. A proper notice of the selection procedure has to be given to the public in order to guarantee the open access on national basis.

Reform

Under Article 2 of Law no. 15 of 2009 the Parliament has delegated the Government to enact one or more Legislative Decrees in order to reform the legal regime of employment in the public sector, by amending Legislative Decree no. 165 of 2001. Among other goals, this reform aims at ensuring a more effective management of selection procedures on a local basis, in accordance with the principle of parity as to the access to public employment. For this purpose, competition notices can provide for admittance requirements based on the place of residence of applicants, provided that these requirements are necessary in order to guarantee the performance of services otherwise totally unfeasible or at least unfeasible with same results (objective *h*).

1.1. Nationality condition for access to positions in the public sector

Legal framework

Italian nationality is a general requirement for access to positions in the public sector, enshrined in Article 51 (1) of the Constitution. The sole exception is provided for by Article 38, paras 1-2, of Legislative Decree no. 165 of 2001, regarding the access to employment in the public sector guaranteed to Union citizens. This provision states in general terms the principle of equal treatment among nationals and Union citizens as to the access to positions in the public sector, excluding those posts which entail the direct or indirect exercise of public authority or are designed to safeguard the general interest of the State. Art. 38 (2) ascribes the task of specifying the posts which are surely reserved to Italian nationals to a Decree of the President of the Council of Ministers.

Besides Article 38 (1), equal treatment among nationals and Union citizens with regard to the recruitment procedures in the public sector is also guaranteed by Article 2 para. 1 (1) of Decree of the President of the Republic 1994 no. 487, referred to by Art. 70 para. 13 of Legislative Decree no. 165 of 2001.

Posts and functions which are reserved to Italian nationals are still listed in Article 1 and 2 of Decree of the President of the Council of Ministers (DPCM) 1994 no. 174 respectively. According to Article 2.2, in case of doubts on the nature of the functions to be performed by the employee, the President of the Council of Ministers, given a reasoned refusal, can deny the access to a specific employment or to the conferral of specific responsibilities, if they involve reserved functions. Such a refusal has general prohibitive effect. Finally, Article 3 defines the general requirements that Union citizens have to possess in order to access to the public service: they must enjoy full rights of citizenship both in Italy and in the State of origin; must satisfy the other prescribed conditions, except for nationality; must have an adequate knowledge of the Italian language.

1.2. Language requirement

Legal framework

Article 3.1 of the Italian Constitution states that ‘All citizens have equal social dignity and are equal before the law, without distinction of sex, race, *language*, religion, political opinion, personal and social conditions’.

According to Article 3 of DPCM 1994 no. 174, Union citizens shall have an adequate knowledge of the Italian language in order to access to posts in the public sector. Furthermore, Legislative Decree no. 165 of 2001 requires the knowledge of at least one foreign language (beside the knowledge of the most widespread information applications) for the access to posts in the public sector (Article 37).

The official language is Italian, but a special status is reserved to French in Valle d’Aosta (see Article 38, Constitutional Law no. 4 of 1948), German in Trentino-Alto Adige (see Article 1 of Decree of the President of the Republic no. 752 of 1976, Article 427 of Legislative Decree no. 297 of 1994, and Article 8 of Decree of the President of the Republic no. 75 of 1976 as to the so called ‘*proporzionale etnica*’) and Slovenian in Friuli-Venezia Giulia (see Article 8 Law no. 38 of 2001 and Article 425 of Legislative Decree no. 297 of 1994).

1.3. Recognition of professional experience for access to the public sector

Legal framework

In the Italian legal system there was no general legislation regarding the recognition of professional experience gained in other Member States by applicants to a post in the public sector, with two main exceptions. Firstly, Article 38 para. 3 of Legislative Decree no. 165 of 2001 lays down a special procedure for the recognition of professional experience or professional diploma for the access to posts in the public sector, provided that no other EU rules applies. According to this provision, the experience necessary to Union citizens to participate to the open competition or to be appointed in the public sector is recognized by a Decree of the President of the Council of Ministers, issued at the request of the competent Ministry. The scope of application of this procedure is not clear. Secondly, a further exception is provided for in the special regulation concerning the recruitment of teachers. More specifically, with regard to the recruitment of teaching staff by means of permanent aptitude lists, according to Decree-Law no. 97 of 2004 (turned into Law no. 143 of 2004), Annex B, paragraph 3 (letter e), the Public administration has to award the same points to both the teaching professional experience acquired in other Member States and to that acquired in Italy. From the academic year 2005/2006 the professional teaching experience acquired abroad (working for Italian schools abroad or for schools of any Member State) is recognized as equal to the professional teaching experience acquired in Italy, no matter when the experience abroad was acquired (see Consiglio di Stato, judgement 17-2-2006, no. 673).

In this respect, the case *Arbe Acha Maria Lourdes c. Ministero della Pubblica Istruzione e Provveditorato agli Studi di Salerno* (Tribunale amministrativo regionale Campania, Napoli, section 1, judgment 19-1-2008 no. 56/2008) it is worthy of notice. A Union citizen was excluded by the public administration from the participation to a competition to assign posts as teacher of Spanish language (the competition specifically qualified as *3C-Conversazione in lingua spagnola*). Participation to this competition was exclusively based on two conditions: a 360 days teaching professional experience and a professional diploma as certified teacher. According to the public administration, Mrs Arbe Acha lacked both conditions because her teaching professional experience was not gained in Italy but in Spain and her professional diploma as certified teacher was awarded in her State of origin. According to the judge, the decree of exclusion was contrary to Article 39 TEC and Regulation no. 1612/68/EEC as to the refusal of recognition of professional experience gained in other Member States, and to Directive no. 89/48/EEC as to the refusal of recognition of a professional diploma awarded in other Member States. Since the competition notice should be interpreted in conformity with EC law, the Tribunal declared the contested decree null and void.

Reform

Article 5 of Decree-Law 8-4-2008 no. 59 *Disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzioni di sentenze della Corte di giustizia delle Comunità europee* (turned into Law 2008 no. 101) titles *Disposizioni in materia di riconoscimento del servizio pubblico svolto nell'ambito dell'Unione europea. Esecuzione della sentenza della Corte di giustizia resa in data 26 dicembre 2006 nella causa C-371/04*. It states that Public Administration (in accordance with Art. 39 TEC and Article 7 of Regulation no. 1612/68/EEC) has to recognize

the professional experience and seniority gained by Union citizens in the exercise of a comparable activity within the public administration of another Member State (even before accession) or of an EU body as equivalent to the experience or seniority acquired in Italy, when professional experience or seniority is considered relevant by Public Administration for any economic or legal purpose. In any case, Article 5 does not modify Article 38 of Legislative Decree no. 165 regarding Union citizens' access to public employment. What the real scope of application of the provision is, is not clear. Under its title, it seems limited to redress the case decided by the Court of Justice. Nevertheless, the provision itself does not refer to the case and seems to have a wider scope.

2. WORKING CONDITIONS

According to Article 24 of Legislative Decree no. 165 of 2001, a key role is attributed to the collective agreements as to the working conditions: economic treatment of employees in the public sector (both fundamental and accessory economic treatment), career advances and professional development in general, and determination of the tasks of the employees related to every kind of office in the Public Administration. The economic treatment of civil servants is set by the national collective employment agreement for each sector of the public administration. Each agreement provides for a minimum basic economic treatment and an accessory economic treatment which varies depending on duties and responsibilities related to each single position and the success of each employee in achieving the objectives set by the public employer. According to Article 45 of Legislative Decree 2001 no. 165, each public administration has to grant equality of treatment to its employees.

Reform

Article 5 of Decree-Law 2008 no. 59 (already mentioned in the previous paragraph) states in general terms the principle of recognition of professional experience and seniority gained by Union citizens in the public administration of other Member States (or working for EU bodies) as equivalent to the experience or seniority acquired in Italy. According to the same article, any legal provision or national collective employment agreements' clause in contrast with this principle is not applicable.

Chapter VI

Members of the Worker's Family and Treatment of Third Country Family Members

1. RESIDENCE RIGHTS: TRANSPOSITION OF DIRECTIVE 2004/38/EC

Text in force

Legislative Decree 6-2-2007 no 30, in force from 11-4-2007, transposing Directive 2004/38/EC into the Italian legal system.

During 2008, an amendment to the legislation took place regarding the members of the family of the Union citizen who is not a worker: the amount of economic resources deemed to be sufficient in order to exercise the right of residence has changed as a consequence of the amendment of the general legislation on immigration. The Government amended the act transposing Directive 2003/86/EC on family reunification (Legislative Decree 3-10-2008 no 160, GURI 21-10-2008 no 247). Since the amount of the resources, which the Union citizen is to have, is calculated taking into account the criteria stated by the general legislation on immigration relating to family reunification, the amendment to the rules on family reunification of non-EU foreigners are also relevant for the citizens of the Union. A [circular letter by the Ministry for the Interiors \(28-10-2008 no. 13\)](#) states the following amounts¹⁷ that have to be calculated taking the resources of each member of the family living under the same roof into account. These resources shall stem from a legal source.

- Citizen of the Union + one member of the family older than 14 years old = eur 7.714,00 for the year 2008
- Citizen of the Union + one child of less than 14 years old = eur 7.714,00
- Citizen of the Union + two or more children younger than 14 years old = 10.285,34
- Citizen of the Union + two or more children younger than 14 years old + one member of the family older than 14 years old = eur 12.856,67.

Corte di Cassazione, judgment of 14-11-2008 no. 27224

The claimant is an Italian citizen married to a Tunisian man. Immediately after the wedding, the wife asked for an entry visa for family reunification for her husband. The application was refused because an alert for the purpose of refusing entry had been issued toward her husband. The applicant lodged a petition under Article 30 of the general legislation on immigration (Legislative Decree 1998 no. 286). This provision states that the refusal of the entry visa for family reunification can be challenged to the Tribunal, and, if the judge upholds the claim, it can issue the entry visa.

Having been rejected by the lower courts, the case arrived to the Supreme Court.

The claimant submitted that the case was covered by EC law and by the judgment of the European Court of Justice in case C-503/03 *Commission v. Spain* (2006 ECR, I-1097). The

¹⁷ The basic amount corresponds to the social allowance (eur 5.142, 67 for 2008, and 5.317,65 for 2009).

According to the previous regime, the following amounts were required:

- citizen of the Union + one member of the family (irrespective of age): eur 5.142,67 for 2008
- citizen of the Union + two or three members of the family: eur 10.285,34
- citizen of the Union + four or more members of the family: eur 15.428,00.

Supreme Court rules the Italian legislation on the citizens of the Union out as applicable law, since this law (Legislative Decree 2002 no. 54, now repealed) states that it does not prevail over international agreements, among which is the Schengen Convention. Since the alert is the essential element, the present case is regulated by the Schengen Convention and by the Italian law (Article 4 para. 6 of the general legislation on immigration, regulating the effects on the application for an entry visa stemming from an alert). These provisions shall be applied taking into account the judgement of the Court of Justice mentioned by the claimant. Therefore, an alert cannot amount to the only reason to refuse the entry visa, but other reasons should be given, showing that the person represent a danger to the public. In the present case, the refusal is illegal, because it was grounded only on the existence of an alert. But for the judge to issue the entry visa under Article 30, the claimant bears the burden of proving that no other reasons prevent the issuing of the visa. In order to prove this, the claimant has to submit the reasons upon which the alert was based, addressing the issuing authority according to the law. Having failed to demonstrate that, the application is dismissed.

1.1. Situation of family members of jobseekers

No specific provisions address this issue.

1.2. Application of Metock judgement

The non-EU member of the family has to register his residence with the Municipality of the place of residence (Article 9 of Legislative Decree 2007 no. 30) and ask for a residence card to the Police Headquarters (Article 10 of Legislative Decree 2007 no. 30). In both cases the entry visa, when entry is conditional upon it, shall be attached to the applications among the other documents listed (see para. 5 of Article 9 and para. 3 of Article 10).

The keeper of the population registry passes the application to be entered into the population registry submitted by the non-EU family member to the Police Headquarters (para. 7 of Article 9 of Legislative Decree 2007 no. 30).

Circular no. 19 of 6-4-2007 states that since a foreign citizen can be entered into the population registry only if his staying in Italy is legal, the non-EU member of the family has first to apply to the Police Headquarters for the residence card.

The treatment of the non-EU family member of an Italian national is within the scope of Legislative Decree 2007 no. 30, unless more favourable provision could be applicable. One more favourable provision is Article 19 (2) c of Legislative Decree 1998 no. 286 prohibiting the expulsion of relatives to the fourth degree included in the household of an Italian citizen and the spouse of an Italian citizen. The Constitutional Court has stated that the provision cannot be applicable to the members of the family of a non-EU foreigner, since the foreigner married to a foreigner is not on the same footing as the foreigner married to an Italian national (order of 14-4-2006 no. 158). Article 19 (2) c does not require legal residence. Nevertheless, it cannot be applied to a foreigner who has already been expelled. Therefore if the foreigner gets married to an Italian national after being expelled, s/he cannot benefit from any protection (see Corte di Cassazione, sez. I civ., judgments of 11-7-2006, no. 15753 and 17-7-2006, no. 16208). But if the expulsion order has not been enforced yet, it is revoked after the marriage has taken place.

The family member who cannot be expelled pursuant to Article 19 (2) is issued with a residence permit (see Article 28 of Decree of the President of the Republic 1999 no. 394). The only requirement is cohabitation. Therefore, in order to be granted a residence permit, the spouse of an Italian national does not need to demonstrate that s/he legally stays in Italy but only that s/he cohabits with her/his Italian spouse (see Corte di Cassazione, sez. I civ., judgment of 3-11-2006 no. 23598). A de facto separation does not grant protection (see Corte di Cassazione sez. I civ., judgment of 2-8-2006 no. 18220)¹⁸.

This provision and case-law cannot be applied to the non-EU family member of the citizen of the Union, since the consolidated legislation on immigration only applies to non-EU foreigners.¹⁹

Tribunale di Reggio Emilia, decree 27-12-2008

The judge makes reference to the *Metock* judgment in order to decide the case of the non-EU spouse of an Italian national. In fact, Article 23 of Legislative Decree 2007 no. 30 states that non Italian family members of Italian nationals are within the scope of the rules on the status of Union citizens where these rules are more favorable to them. According to the judge, whether a rule is more or less favorable to the family members shall be assessed on a case by case basis. If the general legislation on immigration was to be applied, cohabitation of the spouses would be a necessary condition for the issuance of a residence permit to an illegal foreigner married to an Italian citizen. On the contrary, under EC law cohabitation is not required. Since in the present case the spouses do not live together, the application of the general legislation on immigration will lead to expulsion of the foreigner. Therefore, the judge decides the case on the basis of EC law as interpreted by the Court of Justice in the *Metock* case.

Corte d'appello di Venezia, decree 23-3-2009 no. 112

The judge makes reference to the *Metock* case and quashes the refusal of the 'residence card of a family member of a Union citizen' that the proceeding authority based on irregular entry of the applicant (who subsequently married a Union citizen). The judge adds that the applicant is entitled to be issued with the residence card.

Tribunale amministrativo regionale per il Veneto, 2009 no. 329.

The Administrative Tribunal of Veneto referred to the *Metock* case to avoid a reverse discrimination. The case was a judicial review of the Questura's denial of the conversion of the residence permit for family reasons into a residence permit for working reasons. The applicant is a Russian national who entered Italy under a tourism visa in 1999 and got married to

18 The Tribunal of Alessandria asked the Constitutional Court whether Article 3 of the Italian Constitution prohibiting discrimination, prevents the non-EU spouse of an Italian citizen from being treated differently than the non-EU spouse of a citizen of the Union: the general legislation on immigration states that the non-EU spouse is protected from expulsion (and issued with a residence permit) only if lives under the same roof with his/her Italian spouse, while Legislative Decree 2002 no. 54 on the status of citizens of the Union does not ask for this requirement. In other words, a reverse discrimination could take place, prohibited by the Italian Constitution. The Constitutional Court did not answer this question (order no. 107 of 2008), because of the subsequent amendments to the provisions under examination, and asked the remitting judge to evaluate the question again under the new provisions.

19 During 2008 the provision stating that the consolidated law on immigration does not apply to EU citizens, unless the provisions contained therein are more favourable in comparison with those that are provided for in the general set of rules normally applied to them (Article 1, para. 2, of the consolidated law on immigration, and upheld by the Supreme Court: see judgment 27-1-2000 no. 439) has been repealed.

an Italian national. Under the Italian law, an illegal foreigner married and living under the same roof with an Italian national cannot be expelled and is granted a residence permit for family reasons. In the present case, the couple separated. The Questura asserted that the holder of a residence permit for family reasons should keep on living under the same roof with her spouse to maintain her permit.

The tribunal decided that in the present case the Questura was obliged to convert the residence permit for family reasons into a residence permit for working reasons. In fact, living under the same roof is necessary only for the issuance of the permit. Once granted, it is no longer conditional upon it. The judge decided the case according to Italian law, but it referred to the *Metock* case and to Directive 2004/38/EC as additional arguments to support its decision. He pointed out that according to the European Court of Justice the spouse of the Union citizen ‘irrespective ... of how the national of a non-member country entered the host Member State’ enjoys the right to stay. Therefore, applying different rules to the present case (spouse of an Italian national) would amount to a reverse discrimination and would also be contrary to Article 8 ECHR.

Recent literature

On the *Metock* case:

- R. Miele, Il diritto di ingresso del coniuge extracomunitario del cittadino dell’UE nella sentenza della Grande Sezione della Corte di Giustizia CE del 25 luglio 2008, nel procedimento C-127/08, ed i riflessi sulla normativa italiana, *immigrazione.it*, no. 77/78 of 1-8-2008 (the Author says that other family members of the citizen of the Union could benefit of the reasoning of the Court and have their residence made legal. As a consequence of the ruling, Italy cannot issue any more the non-EU foreign whose residence is illegal but who married an Italian citizen with a residence permit under Article 28 of Decree of the President of the Republic 1999 no. 394, but should grant him a residence card under Article 9 of Legislative Decree 2007 no. 30.)
- P. Morozzo della Rocca, L’esercizio della libertà di circolazione non tollera ostacoli alla coesione familiare, *Corriere giuridico*, 2008, p. 1375-1379 (the Author points out that requiring an entry visa for obtaining a residence card is contrary to the judgment. He adds that the non-EU family members of the Italian national who have been issued with a residence permit under Article 28 of Decree of the President of the Republic 1999 no. 394, should benefit from the rules of Legislative Decree 2007 no. 30 with the effect that cohabitation can no more be required.)
- C. Berneri, Il diritto dei familiari extracomunitari di cittadini dell’Unione a risiedere in uno Stato membro, *Quaderni costituzionali*, 2009, p. 413-416 (brief note on the *Metock* case and on British and Danish reactions thereto)

1.3. How the problems of abuse of rights (marriages of convenience) are tackled

Italy did not enact specific provisions to implement Article 35, when it transposed Directive 2004/38/EC. A law waiting to be published on the Official Journal [see Chapter IX for more details] is intended to oppose marriages of convenience. It will regard Article 116 of the Civil Code on marriage of foreigners in Italy. The provision as currently worded states that the foreigner who wants to get married in Italy shall submit to the registrar a declaration by the competent authority of his country of origin stating that there are no impediments to mar-

riage. The amendment will add a new requirement: the foreigner shall also prove that his presence in Italy is legal. The provision is clearly aimed at preventing the illegal foreigner from getting married in Italy and subsequently benefitting of the *Metock* judgment. But, since broadly drafted, it should be applicable to every foreigner, either residing in Italy or abroad.

2. ACCESS TO WORK

Article 6 (3) of Legislative Decree 2007 no. 30 (transposing Directive 2004/38) states that, subject to special regulations in line with the EC Treaty and EC laws, the Union citizen's family members staying in Italy for up to three months, are subject to the same obligations as Italian nationals in the exercise of allowed activities.

Article 19 (1) of Legislative Decree 2007 no. 30 states that the Union citizen's members of the family who enjoy the right of residence or of permanent residence, are entitled to engage in employment or self-employment in Italy, with the exception of those activities that the law, in conformity with EC law, reserves to Italian nationals.

3. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS

No specific provisions address this issue.

4. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

Article 19 (2) of Legislative Decree 2007 no. 30 states that the Union citizen's members of the family who enjoy the right of residence or of permanent residence, are entitled to equal treatment with Italian nationals, irrespective of their nationality. During the first three months, social security benefits are not granted, but those rights to social benefit that are associated with the activity pursued or otherwise granted by the law, shall not be affected (see Article 19 (3)).

The unemployment benefit and the child and family allowance are the two main social security mechanisms that EU workers in economic difficulties may benefit from. All salaried employees are entitled to the unemployment benefit, without distinctions of status. The child and family allowance is distributed along with the monthly salary to those with low incomes.

The National Social Welfare Institution (INPS – *Istituto nazionale di previdenza sociale*) has made clear that Romanians and Bulgarians were entitled to the child and family allowance from the date of accession (circular 23-2-2007 no. 46).

Discrimination of a non-EU member of the family and migration: The number of foreigners that can be admitted for working reasons is established yearly by way of a Decree of the President of the Council of Ministers (the so called '*decreto flussi*' – flows decree). For the year 2008, 150.000 entries are allowed. As a rule, each prospective employer shall submit a request for hiring a known or unknown foreigner and the requests are satisfied according to the 'first come, first served' principle. For the 2008-quota no new request is possible,

but the Ministry of the Interiors will consider the requests submitted for the 2007-quota and not satisfied (since they greatly outnumbered the quota: 740.000 requests for 170.000 entries).

The non-EU perspective employer should confirm the request submitted for the 2007-quota and not satisfied, within 3-1-2009. Italian or EU perspective employers were not under this obligation. The non-EU family members of the Union citizen are equated with non-EU foreigners (and have to confirm their request) and not with Italian nationals or Union citizens (see Ministry of the Interiors, circular letter 5-12-2008 no. 5303).

Recent legal literature

- W. Chiaromonte, Il rientro del lavoratore nello Stato membro di cui è cittadino ed il diritto di soggiorno del familiare cittadino di un paese terzo, *Diritto immigrazione e cittadinanza*, 2008, 2, p. 88-94 (comments on case C-291/05 *Eind* [2007])
- M. Condinanzi & C. Amalfitano, La libera circolazione della ‘coppia’ nel diritto comunitario, in: S.M. Carbone & I. Queirolo (eds.), *Diritto di famiglia e Unione europea*, Giappichelli, Torino, 2008, p. 31-65 (on the notion of spouse and partner of the foreigner according to Italian and EC law, for the purpose of family reunification.)
- R. Miele, I limiti alla mobilità per motivi di lavoro nei Paesi dell’Ue del familiare extracomunitario del cittadino italiano titolare del diritto di soggiorno permanente, *immigrazione.it*, no. 75 of 1-7-2008 (on case C-10/05 *Mattern and Cikotic* [2006]. The Author points out that the non-EU spouse of the citizen of the Union enjoys no right to move and work in another member State, while the long term resident according to Directive 2003/109/EC does. Therefore, the non-EU spouse should be given the option to ask for a residence card as long term resident instead of as family member of the citizen of the Union.)
- F. Mosconi, Europa, famiglia e diritto internazionale privato, *Rivista di diritto internazionale*, 2008, p. 347-374 (In passim the Author wonders whether the Italian provision requiring the spouses to be of the opposite sex could be put aside pursuant to the *Arblade* and *Leloup* cases of the Court of Justice. In these cases the Court held that public-order legislation is not exempt from compliance with EC law and can limit the free movement only if it respects the Treaty or the case-law.)
- P. Pomponio, Riflessioni sui limiti al diritto di ingresso e di soggiorno dei familiari extracomunitari del cittadino europeo e del cittadino italiano, posti dal diritto europeo e dal diritto nazionale, *immigrazione.it*, no. 69 of 1-4-2008
- O. Vercelli, Le unioni civili registrate (DICO e CUS) e l’applicazione degli artt. 2 e 3 (comma 2) del D.Lg. 6 febbraio 2007 n. 30 con riferimento ai ‘familiari’ del cittadino europeo e agli aventi diritto in genere alla libera circolazione nell’ambito dell’Unione europea, *Lo stato civile italiano*, 2008, p. 116-118 (the Author expresses the wrong assumption that the partner of the citizen of the Union enjoys a right to residence, and points out that the family for the purpose of Directive 2004/38/EC is different from the family for the purpose of the Italian legislation on the population registry.)
- M. Garattoni, Subordinazione del diritto al ricongiungimento familiare al diritto alla libera circolazione delle persone ed equiparazione del diritto al ricongiungimento del lavoratore economicamente inattivo a quello del lavoratore economicamente attivo, *Rivista italiana di diritto del lavoro*, 2008, II, p. 727-730 (brief note on the *Eind* case)

Chapter VII

Relevance/Influence/Follow-up of recent Court of Justice Judgments

C-287/05 Hendrix

The Italian legal order does not envisage a benefit such as the one under review in this case.

C-527/06 Renneberg

Under the income tax act (Decree of the President of the Republic of 1986 no. 917) the rental loss on immovable property is not taken into account in order to determine the basis of assessment of the income tax of a non-resident taxpayer (see Article 24), while interests paid on the mortgage are deducted from the gross income tax. On the contrary, resident taxpayers are entitled to both advantages (Article 10 para. 3 bis and Article 15 para. 1 lett. b).

C-94/07 Raccanelli

A case similar to the *Raccanelli* one could hardly have taken place in Italy, since there is only one kind of contract that doctoral students can sign with Universities or research institutions.

Nevertheless, it cannot be excluded that a doctoral student could claim to be a worker for the purpose of free movement of persons, for instance when he applies to the Municipal authorities for the registration of his residence. In fact, Universities may give limited teaching assignments to doctoral students, which shall not interfere with their primary research activity.²⁰ The University of Milan, for instance, provides that doctoral students may be asked to perform paid subsidiary teaching or tutorial activities for a maximum of 150 hours per year.

On the case, S. Borelli, *La nozione di 'lavoratore' e l'efficacia dell'art. 39 del Trattato CE*, *Rivista italiana di diritto del lavoro*, 2009, II, 225-228.

C-371/04 Commission v Italy [2006] ECR I-10257: Article 5 of Decree-Law 8-4-2008 no. 59 (turned into Law 2008 no. 101) was particularly adopted to implement the judgment of the Court of Justice. It states that Public administration (in accordance with Art. 39 TEC and Article 7 of Regulation no. 1612/68/EEC) has to recognize the professional experience and seniority gained by Union citizens in the exercise of a comparable activity within the public administration of another Member State (even before accession) or of an EU body as equivalent to the experience or seniority acquired in Italy, when professional experience or seniority is considered relevant by Public administration for any economic or legal purpose. In any case, Article 5 does not modify Article 38 of Legislative Decree no. 165 regarding Union citizens' access to public employment. What the real scope of application of the provision is, is not clear. Under its title, it seems limited to redress the case decided by the Court of Justice. Nevertheless, the provision itself does not refer to the case and seems to have a wider scope.

²⁰ See Article 4 § 8 of Law 1998 no. 210 (Norme per il reclutamento dei ricercatori e dei professori universitari di ruolo).

ITALY

Case C-262/99, *Louloudakis* [2001] ECR I-5547: The Supreme Court (fiscal chamber, judgment 14-4-2008 no. 9856) made an express reference to the *Louloudakis* case to decide whether an Italian taxpayer who was resident in another member State but retained in Italy strong personal ties was to be considered as resident in Italy for fiscal purposes (income tax) or not. While his residence was abroad, the man had his domicile in Italy, lived there, was the CEO of a number of companies, and frequented a golf club in his spare time. The Court evaluated the case according to the criteria laid down by the Court of Justice in the *Louloudakis* case, and decided that personal ties should be given primacy.

Case C-148/02 *Garcia Avello* [2003] ECR I-11613: By circular letter of 12-6-2008, the Ministry of the Interiors has given instructions toward the implementation of the *Garcia Avello* case law. It stated that the decree by which Italian citizenship is granted to Spanish or Portuguese nationals shall bear the surname of the newly Italian citizen as formed according to the his/her national law at the time of his/her birth, that is the surname composed by the first surname of the father and the surname of the mother.

Chapter VIII

Application of Transitional Measures

Italy lifted the transitional arrangements regarding workers from A8 during 2006.

The transitional period for workers from A2 decided in 2007 is still in force. The Ministries of the Interiors and for Social Solidarity extended the transitional period for 2008 by [circular no. 1 of 4-1-2008](#) and for 2009 by the [circular no. 1 of 14-1-2009](#). Therefore, the entry for work reasons is not subject to any condition in the following areas: agriculture, tourism and hotel business; construction; domestic work and personal assistance; mechanical engineering; management and highly skilled work; seasonal work. The employment of a Bulgarian or Romanian citizen in other areas is conditional upon a no objection certificate ('*nulla osta*') issued by the Immigration Office. The prospective employer shall submit a request for the authorization, attaching the conditions of work s/he is going to apply to the worker. Before deciding, the Immigration Office shall ask the Provincial Labour Administration for its opinion on the contractual conditions applied to the contract of employment in the area in question. The worker provided with the '*nulla osta*' is not required to ask for a visa to enter Italy.

A Bulgarian or Romanian worker entering Italy during 2008 or 2009 who applies for registration of his/her residence with the municipal authorities has to prove that s/he is a worker and show the '*nulla osta*' when required (see Ministry of the Interiors, [circular letter 19-1-2009 no. 3](#)).

No case-law is reported.

Comments on the judgment of the Supreme Court no. 2451 of 2008 on the legal consequences of the entry into force of the accession treaty on criminal proceedings with respect to criminal offences related to illegal immigration committed by Romanian or Bulgarian citizens:

- M. Gambardella, Nuovi cittadini dell'Unione europea e *abolitio criminis* parziale dei reati in materia di immigrazione, *Cassazione penale*, 2008, p. 909-926.
- C. Renoldi, Le conseguenze dell'ingresso nell'Unione europea di Bulgaria e Romania sul reato di inosservanza dell'ordine del Questore, *Diritto immigrazione e cittadinanza*, 2008, 1, p. 99-106.
- A. Taboga, Adesione all'UE e successione di norme penali, *Giurisprudenza italiana*, 2009, p. 2298-2300.

Chapter IX

Miscellaneous

In 2008 the newly established Government introduced some relevant amendments to the consolidated law on immigration (Legislative Decree no. 286 of 1998):

- a) A specific penalty (imprisonment from 6 months to 3 years) was introduced for those who rent an apartment or any other immovable property to a foreigner without a regular permit of stay.
- b) The Legislative Decree on the procedures for granting and withdrawing refugee status (no. 159 of 2008) has brought some amendments and integrations to Legislative Decree no. 25 of 2008, implementing Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status. The new rules have limited the suspensive effect of the appeal against first instance decisions, issued in relation to applications that were considered manifestly ungrounded, and have provided for the application of mandatory retention for asylum seekers that were issued a *refoulement* measure upon arrival in Italy as well the reduction of the deadline to lodge an appeal.
- c) Legislative Decree no. 160 of 2008 has modified previous legislation on family reunification in relation to revenue criteria and beneficiaries and has expressly introduced the possibility of replacing certifications attesting the degree of kindred, in the event that they cannot be produced or doubts subsist on their genuineness, with statements based upon the DNA tests.

A Law, presented by the Government and passed by the Parliament at the beginning of July 2009, but not yet into force, will bring far-reaching amendments to Italian legislation on immigration and a few provisions will deal with Union citizens (and are reported in the previous Chapters). At the time of writing, the law has not been published yet because the Government wants to enact some rules to protect illegal non-EU foreigners working in families as ‘badante’, that is taking care of elderly or ill people. In fact, one of the main novelties is the introduction of the crime of ‘irregular entry and stay on the national territory’ which should be punished, unless it constitutes a more serious offence, with a pecuniary penalty from 5 to 10 thousands Euro. If the person is expelled, the judge will adopt an order of non acquittal. From the entry into force of the law, every non-EU foreigners illegally living in Italy will be punishable for the crime, even those (up to five hundred thousand, according to estimates) that have a job. To avoid that many Italian families who count on the help provided for the foreigners are endangered, the Government is studying a sort of amnesty. The two sets of rules are intended to enter into force together.

Annex: Frontier workers

As far as we know, there are no specific administrative or legal schemes for frontiers workers.

Italy concluded a bilateral treaty with Slovenia on social security (Ljubljana 7-7-1997) which is applicable to frontiers workers too; and two bilateral agreements with Switzerland, the first on taxation of frontier workers (Roma, 3-10-1974), the second on unemployment treatment for frontiers workers (Berne, 12-12-1987).

The debate on the issue at national level is not developed, as the case of the draft law on tax relief for frontier workers shows. On May 2008 a draft law on the subject was submitted to the newly elected Parliament (act of the Senate no. S 530), but more than one year later its examination has not even get started.

There is a debate at local level, in those Italian Regions directly involved in the question. They ask for more clear rules on the status of frontiers workers. The lack of rules between Italy, Slovenia and Croatia gives way to undeclared employment, tax evasion and workers deprived of social security benefits.